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June 2, 2004

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Deborah Taylor Tate, Chairman
Tennessee Regulatory Authority
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Via Hand Delivery

Re Petition of On-Site Systems, Inc To Amend Its Certificate of Convenience and
Necessity
Docket No 03-00329

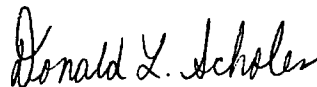
Petition of Tennessee Wastewater Systems, Inc To Amend Its Certificate of
Convenience and Necessity
Docket No 04-00045

Dear Chairman Tate

I have enclosed for filing the original and fourteen copies of the Supplemental Memorandum of Law in Support of Motion to Dismiss East Sevier County Utility District as an Intervenor in this consolidated matter. Please return the extra copy of the Supplemental Memorandum of Law to me stamped filed.

Thank you for your assistance in this matter.

Sincerely yours,



DONALD L. SCHOLLES

Enclosures

c Charles Pickney, Jr
Mark Jendrek
Charles B. Welch, Jr
G. Scott Thomas

BKSJ File No 04-189

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

IN RE:)	
)	
PETITION OF ON-SITE SYSTEMS, INC. TO AMEND ITS CERTIFICATE OF CONVENIENCE AND NECESSITY)	Docket No. 03-00329
)	
)	
and)	
)	
)	
PETITION OF TENNESSEE WASTEWATER SYSTEMS, INC. TO AMEND ITS CERTIFICATE OF CONVENIENCE AND NECESSITY)	Docket No. 04-00045
)	
)	

**SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF MOTION TO
DISMISS EAST SEVIER COUNTY UTILITY DISTRICT AS AN INTERVENOR**

On May 19, 2004, Tennessee Wastewater Systems, Inc. (the Company) filed a Motion to Dismiss East Sevier County Utility District as an intervenor in Docket No. 03-00329 and Docket No 04-00045. The Company filed this motion just prior to the status conference on May 20, 2004, so all parties would be aware of this issue prior to status conference. The Company requested an opportunity to more fully address this issue after the status conference.

The Company moved that East Sevier County Utility District (the District) be dismissed as an intervenor because the District was not legally created under the Utility District Act of 1937 as amended, T.C.A. § 7-82-101 *et seq.* The District was not legally created because its order of creation failed to state the utility services the District was authorized to provide as required by T.C.A. § 7-82-202(a)(2).

Prior to an amendment to T.C.A. § 7-82-202 in 1968, an order creating a utility district was not required to state the services the utility district was authorized to provide. In 1968 the legislature enacted Public Chapter 529 of the 1968 Tennessee Public Acts (the 1968 amendment) which established this requirement. A copy of the 1968 amendment is attached to this Supplemental Memorandum of Law as Exhibit A. This same act amended T.C.A. § 7-82-302 which now provides that utility districts created after July 1, 1967 shall be empowered to “furnish only those services stated in the order creating the district.” Utility districts created prior to July 1, 1967, can only provide the utility services such utility districts were providing on that date. If a utility district desires to provide additional utility services, a supplemental petition must be filed with the county mayor requesting such authority.

The order creating East Sevier County Utility District failed to comply with this statutory requirement set forth in T.C.A. § 7-82-202(a)(2). Therefore, the District has not been validly created. The Company asserts this noncompliance renders the District’s creation void. The Company asserts that the District should not be permitted to participate in this proceeding when it has not been validly created as required by statute. Since the District’s creation is void, it has no legal rights which can be affected in this proceeding.

When a utility district or other municipal corporation has failed to follow the statutory procedure for its creation, the legislature can validate the creation of the utility district by subsequent legislation. I have attached as Exhibit B to this Supplemental Memorandum of Law Chapter 192 of the 1953 Tennessee Private Acts which validates the creation of the Gibson County Utility District. Until the legislature passes a similar act for East Sevier County Utility District, the District has no legal right to participate in this proceeding because its creation is void. While the District may assert

it is a *de facto* municipal corporation for the purpose of defending any claims made against it based upon its invalid creation for past services and transactions, the District cannot affirmatively assert a legal right or interest in a legal or administrative proceeding because it lacks the legal capacity to do so.

Moreover, a real question exists as to what services the District can provide. Prior to the 1968 amendment to T.C.A. §§ 7-82-202 and 7-82-302(e), a utility district had the power to provide any of the services a utility district was authorized to provide which include:

water, sewer, sewage disposal, natural gas, natural gas storage and related facilities, liquefied natural gas storage and related facilities, liquid propane gas storage and related facilities and other gaseous storage and related facilities, artificial gas, police, fire protection, garbage collection and garbage disposal, street lighting, parks and recreational facilities, transit facilities, transmission of industrial chemicals by pipeline,...transmission of natural gas by pipeline... community antenna television service...or two (2) or more of such systems....

T.C.A. § 7-82-302(a)(1).

The purpose of the 1968 amendment was to limit the utility services a utility district could provide. An existing utility district could only provide the utility services the utility district was providing on July 1, 1967. A new utility district created after July 1, 1967, only has the power to provide the utility services stated in its order of creation. The District's order of creation does not state the services it is authorized to provide; therefore, the District does not have the power to provide water or sewer service.

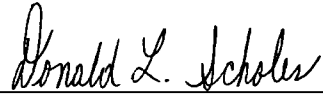
The District may seek to legally validate its creation and past services by getting the General Assembly to enact a bill validating, legalizing and confirming its creation. The District may seek to create itself as a utility district to provide water and sewer services in the future by filing a petition for creation with the Sevier County Mayor and obtaining an order authorizing it to provide water and

sewer services. Until either of these event occurs, the District has no power to provide water and sewer service. The District certainly has no power to extend its water and sewer services into areas it is not already serving as a *de facto* utility district. The District has no more power to provide sewer service than it has the power to provide electric, natural gas or cable television services. The District has no such power because its order of creation fails to state the services it is authorized to provide as required by statute. Any person seeking sewer service from the District is charged with the knowledge that the District does not have the legal capacity to provide sewer service. *Lebanon v. Baird*, 756 S.W.2d 236, 244 (Tenn. 1988).

Because its order of creation failed to state the services the District was authorized to provide, the District has no legal standing to intervene in this proceeding. The District is not a *de jure* municipal corporation authorized to provide utility services of any kind. The District may be able to justify its ability to continue to provide water and sewer service to existing customers as a *de facto* utility district. Such *de facto* status certainly gives the District no right to intervene in this proceeding based upon its ability to provide sewer service within the area sought by the Company which the District is not serving. More importantly, the District has no power to enter into any contract to provide sewer service to a development or to any person within the area sought by the Company. Any such contract would be void because the District does not have the authority to provide sewer service. Therefore, the District should be dismissed as an intervenor in this consolidated proceeding.

Dated this 2nd day of June, 2004.

Respectfully submitted,



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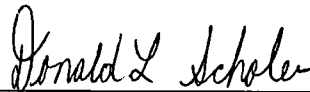
CERTIFICATE OF SERVICE

The undersigned hereby certifies that the above and foregoing Memorandum has been served upon the following persons on this 2nd day of June, 2004 by U.S. Mail, postage prepaid:

Mark Jendrek
Mark Jendrek P.C.
Post Office Box 549
Knoxville, TN 37901

Charles B. Welch, Jr.
Farris, Matthews, Branan, Bobango & Hellen, PLC
618 Church Street, Suite 300
Nashville, TN 37219

G. Scott Thomas
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Nashville, TN 37238



DONALD L. SCHOLES

Chapter 529] PUBLIC ACTS, 1968 417

Frank C. Gorrell,
Speaker of the Senate

James H. Cummings,
Speaker of the House of Representatives

Approved April 4, 1968

Buford Ellington,
Governor

CHAPTER NO. 529

HOUSE BILL NO. 411

By Malone

Substituted for Senate Bill No. 471

By Brown

AN ACT to amend Sections 6-2602, 6-2604, 6-2608, 6-2617 and 6-2630,
Tennessee Code Annotated

*BE IT ENACTED BY THE GENERAL ASSEMBLY OF
THE STATE OF TENNESSEE*

SECTION 1 Section 6-2602 of the Tennessee Code Annotated is amended by deleting the whole of Subsection (a) thereof, and substituting in lieu thereof a new Subsection (a) to read as follows

“(a) a statement of the service or services to be supplied by the proposed District and the necessity for such service or services,

and by striking out all of Subsection (c) of Section 6-2602, and substituting in lieu thereof a new Subsection (c) as follows

"(c) an estimate of the costs of the acquisition or construction of the facilities of the District (which estimate shall not, however, serve as a limitation upon the financing or improvements, or extensions of the facility), an estimate of the costs of operating the proposed facilities, an estimate of anticipated personnel needs, and an estimated schedule of rates and charges for the services to be rendered, and"

SECTION 2. Section 6-2604 of the Tennessee Code Annotated is amended in the following particulars

By adding at the end of the first sentence of said Section the words

"to perform the services stated in the petition." And by inserting between the second and third sentences of said Section the following.

"If the boundaries of the proposed district include territory within five (5) miles of a city or town having a population of 5,000 or over or within three (3) miles of a city or town having a population of less than 5,000, or within three (3) miles of any water, sewerage or gas service facility of a county, city, town or utility district, notice by registered mail of the hearing, its purpose, date and place and the boundaries of the proposed district shall be given the mayor or chief executive officer of such county, city, town, and utility district at least ten (10) days before the hearing "

And by inserting in the third sentence of said Section after the words "defining its territorial

limits" and before the words.

"stating the services to be authorized

And by adding at the following

"Should a city or town herein provided with boundaries within a municipality of 5,000 or more than 5,000 in population shall excise such territory from the proposed district and omit from the district to perform the services in such areas "

"That upon the creation of a Utility District as provided in the President of the State with the Register of Deeds of the Counties wherein the Utility District is located and correct copy of the Order of the Utility District Presidents of any Utility District heretofore created shall, on or before the first copy of the Order of the Utility District with the Secretary of the State of Tennessee, and a copy of the Deeds of the County wherein the Utility District is located of the State of Tennessee, keep a book for

limits" and before the words "and appointing", the words

"stating the service or services which the district shall be authorized to furnish "

And by adding at the end of Section 6-2604 the following

"Should a city or town exercise its prior right as herein provided to serve areas adjoining its boundaries within five (5) miles of a municipality of 5,000 or over in population or within three (3) miles of a municipality of less than 5,000 in population, the County Judge shall excise such areas from the boundaries of the proposed district, or strike from the petition and omit from the order the authority of the district to perform the service or services in such areas "

"That upon the creation or recreation of any Utility District as provided for in this Chapter, the President thereof shall file with the Secretary of State of the State of Tennessee, and with the Register of Deeds of the County or Counties wherein the District is located a true and correct copy of the Order creating the Utility District In addition thereto, the Presidents of any and all Utility Districts heretofore created under the provision of this Act or any private Act of the State Legislature, shall, on or before September 1, 1967, file a copy of the Order creating the Utility District with the Secretary of State of the State of Tennessee, and a copy with the Register of Deeds of the County or Counties wherein the Utility District is located The Secretary of State of the State of Tennessee shall maintain and keep a book for recording such Orders creating

Utility Districts and all fees in connection therewith shall be paid by the District. Any amendments whatsoever to such Order creating the Utility District or any Order merging, consolidating or recreating a Utility District shall be filed in like manner. The failure to so file a copy of such Order or Orders shall be a misdemeanor "

"Whenever two or more Utility Districts by Resolution adopted by the respective governing bodies concur in a merger or consolidation of such Utility Districts or when by Resolution such governing body or bodies agree or propose to consolidate with a municipality or a county by transferring all of their property and obligations to said municipality or county, they may petition the County Judge wherein they were created for an Order permitting such consolidation, merger, recreation, or transfer of its franchise facilities, assets and obligations to a municipal corporation or a county for the purpose of more efficiently and conveniently furnishing the service or services authorized by their Order of Creation. Upon such petition being filed, said County Judge or Judges shall proceed in exactly the same manner as provided in this Chapter for the creation of a Utility District and upon a finding that the public convenience and necessity requires merger, consolidation, recreation, sale or transfer and that the same is economically sound and feasible and in the public interest, an Order shall be entered approving the merger, sale, consolidation or recreation of the District and if the petition is for a consolidation of Utility Districts, it shall be designated as the [] Utility District of [] County or Counties, Tennessee, defining its territorial limits and appointing the Commissioners of the

District all in accordance with the requirements of this Chapter for the creation of a Utility District. In the event such Order provides for the sale or transfer of all franchises, assets and liabilities to a municipality, metropolitan government or a county, then such District shall be dissolved and provision made therein for an equitable distribution of the assets and providing for the termination of the existence of said Utility District and establish the legal rights, duties and obligations of the entities and parties involved. In addition, said Order shall provide that the newly created merger or consolidated Utility District or purchasing governmental entity will assume the operation of the systems then being merged or recreated and account for the revenues therefrom in such a manner as not to impair the obligations of contract with reference to bond issues or other legal obligations of the District or Districts and shall fully preserve and protect the contract rights vested in the owners of such outstanding bonds, obligations, or contractual interests."

"Any party having an interest in the subject matter or aggrieved or prejudiced by the finding and adjudication may pray and obtain an appeal therefrom to the Circuit Court of the County in the manner provided by law for appeals from the County Court, upon the execution of appeal bond as provided by law."

SECTION 3 Section 6-2608 of the Tennessee Code Annotated is amended by adding the following at the end of the first paragraph of said Section

"Provided, however, that Districts created on or after July 1, 1967, shall be empowered to furnish only those services stated in the order creating the District. Districts incorporated before July 1, 1967,

shall be authorized to furnish only the services being furnished on that date, or which will be furnished by facilities to be constructed from the proceeds of bonds issued not later than July 1, 1968. Supplemental petitions for authority to furnish other services contained in this Section may be addressed to the County Judge or Chairman of the County Court, who shall give notice and hold hearings on such petitions in the same manner, on the same issues, and under the same conditions as for original incorporation."

SECTION 4 Section 6-2617 of Tennessee Code Annotated is amended by adding a new paragraph to read as follows

"In addition to the requirements listed in paragraph 1, the annual audit shall show the outstanding indebtedness of the District, the date contracted, the rate of interest paid and purpose for which issued, and the date of maturity thereof. A copy of such annual statement or audit shall be filed with the County Judge or Judges where publication is required in accordance with this Section and Section 6-2635, T C A , and a copy forwarded to the office of the Controller of the Treasury of the State of Tennessee within 30 days from the date of such publication. The failure to file such copies shall be a misdemeanor."

SECTION 5 Section 6-2630 of Tennessee Code Annotated is amended by deleting the last sentence of the first paragraph and substituting therefor the following

"Such notice shall also be given by registered mail at least ten (10) days before the hearing to the County Judge or Chairman of each county situated in whole part within such proposed District, and to the mayor or chief executive officer of each city, town

and utility district as provided in Section 6-2604 "

and by adding the following paragraph at the end of said Section

"The public hearing shall be held before the County Judges or Chairmen of the County Courts of such counties sitting as a panel at a time and place designated by the County Judge or Chairman to whom the petition for the proposed District was addressed. All such County Judges or Chairmen shall be notified of the date, time and place of such hearing at least five (5) days prior thereto, and it shall be the responsibility of such Judges or Chairmen to attend and participate if they elect to do so in such hearing. In the event a majority of such Judges so notified fail to appear and participate in the hearing, the County Judge to whom the petition was addressed may proceed with the hearing and enter appropriate orders as provided in this Chapter. In the event three or more counties are involved and in the event two or more of such Judges or Chairmen elect to attend and participate in the hearing, a majority vote shall be required for the creation of the District "

SECTION 6 The provisions of this Act are hereby declared to be severable. If any of its sections, provisions, exceptions, sentences, clauses, phrases or parts be held unconstitutional or void the remainder of this Act shall continue in full force and effect, it being the legislative intent now hereby declared, that this Act would have been adopted even if such unconstitutional or void matter had not been included therein.

SECTION 7 This Act shall take effect from and after its passage, the public welfare requiring it.

Passed March 28, 1968

680 PRIVATE ACTS, 1953 [Chapter 192]

CHAPTER NO 192

House Bill No 521

(By Wayne Hunt)

A BILL for AN ACT entitled "AN ACT to validate the creation of the Gibson County Utility District of Gibson County, Tennessee, the membership of the Board of Commissioners, the organization by the Board of Commissioners of same and all proceedings in connection therewith"

SECTION 1 *Be it enacted by the General Assembly of the State of Tennessee*, That an Order of the County Court entered by the County Judge of Gibson County, Tennessee on June 29, 1951 creating the Gibson County Utility District of Gibson County, Tennessee and having as its territorial limits the boundaries of the seventh, ninth, tenth, twelfth, thirteenth, and twenty-first Civil Districts of Gibson County, Tennessee and appointing J. O. Long of Trenton, Tennessee, C. C. Berry of Dyer, Tennessee, and Floyd Burrow of Milan, Tennessee as Commissioners of said District, is hereby validated, legalized and confirmed

SECTION 2 *Be it further enacted*, That the minutes of the organization meeting of the Board of Commissioners on July 5, 1951, wherein C. C. Berry was elected as President of the Board and Floyd Burrow was elected Secretary of the Board, is hereby validated, legalized and confirmed

SECTION 3 *Be it further enacted*, That the Resolutions adopted by the Board of Commissioners naming L. E. Hagnewood, Ruthertford, Tennessee, for a term of five years, and Joe Warren, Kenton, Tennessee, for a term of six years as Co-Commissioners of said District is hereby validated, legalized and confirmed, and the said Co-Commissioners shall

Chapter 192] PRIVATE ACTS, 1953 681

henceforth be known and designated as Commissioners and, together and equally with the Commissioners appointed by the County Court as aforesaid, shall constitute the Board of Commissioners of the Gibson County Utility District of Gibson County, Tennessee

SECTION 4 *Be it further enacted*, That the said Board of Commissioners shall always consist of five members, including always a resident of each of the municipalities of Kenton, Ruthertford, Dyer, Trenton, and Milan, or of the Civil Districts in which said municipalities are located Vacancies occurring on the Board shall be filled as provided by Chapter 248 of the 1937 Public Acts of Tennessee, as amended and supplemented.

SECTION 5 *Be it further enacted*, That this Act shall take effect from and after its passage the public welfare requiring it

Passed March 19, 1953

JAMES L. BOWEN,
Speaker of the House of Representatives

VIVIAN MADDAUX
Speaker of the Senate

Approved March 24, 1953

FRANK G. CLEMENT,
Governor